UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OHIO COLLEGE PREPARATORY SCHOOL

Employer

and **Case No. 08-RC-199371**

CLEVELAND ALLIANCE OF CHARTER TEACHERS AND STAFF LOCAL 6570 A/W OHIO FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION

Petitioner submits this statement in opposition to the Request for Review filed by Ohio College Preparatory School ("the Employer" or "OCPS"). The issue raised by the Employer's Request for Review is whether the Regional Director properly determined that no voter disenfranchisement occurred where two employees[1] who received a nonprofessional ballot based on information contained on the Employer-provided *Excelsior*[2] list failed to notify the Board Agent that they had received an incorrect ballot on the day of the election prior to voting.

The Employer has not established the necessary grounds for the Board to grant the Request for Review.

The National Labor Relation Board's Rules and Regulations describe the standard for the Board to grant a Request for Review of a decision by the Regional Director.

> The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

[1] Sharice Wright no longer works at the location in issue.

[2] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 CFR §102.67(c). The Request for Review filed by OCPS does not meet this standard and, therefore, the Board should deny the Employer's request.

In its request, OCPS addresses two grounds for review, asserting that the Regional Director's decision misapplied Board precedent in finding that the Employer had failed to demonstrate that the voters in question were "disenfranchised" under extant Board law; and that there are sound policy reasons to overturn the Regional Director's decision and order a new election in this case. The Union contends that neither the facts nor the law support the Employer's assertions.

The Regional Director's decision is consistent with Board precedent.

In his decision the Region Director correctly noted that, absent unusual circumstances, an employer is foreclosed under Board law from "relying on its own failure to comply with *Excelsior* requirements as a basis for setting aside an election." *Thiele Industries, Inc.*, 325 NLRB 1122 (1998). To hold otherwise would be to invite abuse." *George Washington University*, 346 NLRB 155, 156 (2005). This is so even where the error was "inadvertent." *Theile Industries*, 325 at 1122 (employer "foreclosed from filing an objection based solely on its failure, even if inadvertent, to comply fully with its obligation under the *Excelsior* rule to include all eligible voters on the *Excelsior* list").

The Board, however, recognizes an exception to this rule. In *Republic Electronics, Inc.*, 266 NLRB 852 (1983), the Board held,

> . . .while a party to an election is ordinarily estopped from profiting from its own misconduct, the Board has recognized a limited exception to this rule. Thus, where a party to the election causes an employee to miss the opportunity to vote, *the Board will uphold the wrongdoer's objection if the vote was determinative, there is no evidence of bad faith, and the employee was disenfranchised through no fault of his or her own. . .*

Republic Electronics, Inc., 266 at 853 (emphasis added). Having found that the employees' votes were potentially determinative, and lacking evidence of Employer bad faith, the Regional Director's decision in

the instant case determined that, based on the facts presented, no employees were disenfranchised during the election at issue.

In his decision, the Regional Director noted that in voter disenfranchisement exception cases the Board has "elaborated a doctrine that places a high level of responsibility on the employees." (Regional Director's decision at 5) The Board has found employees to be at fault for not voting even though they were told they were ineligible to vote or because their names were omitted from the *Excelsior* list, placing a significant level of responsibility on the eligible voters in the latter instance. In support of this proposition, the Regional Director's decision cited and discussed *NLRB v. Triangle Express, Inc.*, 683 F.2d 337 (1982); *Berryfast, Inc.*, 265 NLRB 82 (1982); and *George Washington University*, 346 NLRB 155 (2005).

In both *Triangle Express* and *Berryfast*, the Board emphasized that the official notice of election put the affected employees on notice that they were eligible to vote despite being mistakenly omitted from the *Excelsior* list or otherwise told they were not eligible to vote. See *Berryfast, Inc.*, supra (employee erroneously informed twice by employer that another employee was ineligible to vote because that employee was on maternity leave; Board found that the voter in question had not taken reasonable steps to attempt to exercise her right to vote because she failed to present herself at the polling place, and because she had not followed the guidance on the Notice of Election instructing employees to contact the Board about voter eligibility issues); *Triangle Express*, supra (Court noted Board's finding that employees were not disenfranchised even though their names were omitted from the *Excelsior* list; no party prevented employees from voting under challenge and official notice of election put them on notice that they were eligible). The Regional Director's decision also discussed the Board's analysis in *George Washington University*, where, in granting a motion for summary judgment in a test of certification case, the Board explained that the employees who did not vote because they were left off the *Excelsior* list disenfranchised themselves by failing to attempt to vote under challenge. Again the Board put the onus on the voters by stating that the Board's standard notice of election puts voters on notice of their rights.

Although stated in dicta, the Board's pronouncements in *George Washington University* were consistent with established precedent, including *Berryfast* and *Triangle Express*.

Indeed, the touchstone of the Board's analysis when applying this limited exception is whether the employee acted reasonably in their attempt to vote in the election, and the Board has repeatedly found reasonable the obligation that the employees read the election notice, follow the instructions therein, and refer eligibility and other procedural questions to a Board Agent, rather than the employer, if they require information. Although the onus is on the employee to have a basic understanding of their rights as articulated in the notice of election, the Board does not require labor law expertise, as asserted by the Employer. Rather, all that is required is that the employee directs relevant questions to the Board Agent, who is the expert under these circumstances, prior to casting their ballot.

The Employer's attempt to distinguish the present case from this line of well-established Board law—an attempt to narrowly limit each of the Board precedents cited by the Regional Director's decision to its specific facts—fails. As stated in his decision, what is required is that an employee familiarizes themselves with the official notice of election such that they are able to at least ask the Board Agent appropriate questions regarding their eligibility to vote. There is nothing so unique about the facts of this case that makes them wholly distinct from the cases relied upon by the Regional Director, and the Employer's attempt to "create a novel argument by distinguishing this case from those cases in which employees were deemed at fault for losing the opportunity to vote" does not render this case worthy of Board review. (Regional Director's decision at 5)

By contrast, the facts of the instant case are distinguishable from cases in which the Board ordered a new election under its limited voter disenfranchisement exception. See *Republic Electronics,* supra (Board orders new election because determinative voter was restrained from going to the polls by his supervisor); *Cal Gas Redding, Inc.*, 241 NLRB 290 (1979) (election set aside because job assignment given to employee prevented him from going to the polls); *Glen McClendon Trucking Co.,* 255 NLRB 1304 (1981) (new election where truck drivers given job assignments that kept them away from the polls). The current case does not resemble the cases cited by the Employer in support of its Request for Review

of the Regional Director's decision. Here, the disputed employees were at the polls on election day and had the opportunity to ask questions of the Board Agent and to cast their votes, which they each did. The fact that the Employer allegedly misclassified these two employees on the *Excelsior* list, and that neither employee took advantage of the opportunity to question their eligibility prior to casting their vote, is not sufficient to overturn the results of the election, nor does it merit review by the Board.

The Employer has presented no compelling reasons why the Board should reconsider its policy in this case.

The Employer's assertion that the Board's employee disenfranchisement exception jurisprudence runs afoul of Section 7 of the Act is without merit. The disenfranchisement exception strikes the proper balance between the right of employees to freely determine whether they wish to have a bargaining representative and the need to prevent parties from taking advantage of the Board's processes to thwart the outcome of an election. As explained above, a party is normally estopped from relying on its own conduct, even if inadvertent, to overturn the results of an election. This rule was designed to prevent abuse by a party by removing potential incentives for post hoc pronouncements of accidental conduct that could have impacted the results of the election. Nonetheless, in order to protect the Section 7 rights of employees in circumstances where an objecting party to the election has caused a voter to be disenfranchised, the Board created the exception here in dispute to recover the thwarted employee's right to vote. Thus, in cases where a party to the election has prevented access to the Board's voting processes the election results have been overturned in order to protect the rights of those employees. However, as explained in more detail above, where an employee was not prevented by a party from accessing the Board's processes, even where the employee failed to present themselves at the polls, the Board has upheld the results of the election. Rather than infringing on Section 7 rights, the Board's voter disenfranchisement exception was designed to—and, in fact, does—provide protection for employees who, based on the overall rule that a party may not benefit from its own erroneous conduct, would have

otherwise been forcibly left outside of the Board's processes. The Employer, here, would have the exception swallow the rule by not making this important distinction.

The fact that the employees at issue here did not want to be represented by the Union—and the fact that the Employer would like to remain union free—is not enough to warrant Board review to consider a radical change in Board policy. The Regional Director correctly applied well-reasoned Board precedent in protecting employees' rights under the Act while preventing the Employer from profiting from its own failure to comply with the *Excelsior* list requirements, properly placing the responsibility to ensure the accuracy of the *Excelsior* list with the party in the best position to know. To do otherwise would "invite abuse." *George Washington University*, 346 NLRB at 156.

Conclusion

The Employer has failed to establish a compelling reason why the Board should countenance a Request for Review in this case. The Regional Director's decision correctly applied long-standing Board precedent, and the Employer's dissatisfaction with the results of the disputed election is no reason to modify Board precedent in this case. The Board's reasonable requirement that employees voting in an election should make themselves familiar with the notice of election such that they are able to ask the Board Agent questions about their eligibility prior to voting is not so onerous that it requires revision.

For the reasons articulated in this statement, the Regional Director's decision, and the Union's prior position statements submitted to the Region in this case, the Union respectfully request that the Employer's Request of Review of the Regional Director's decision be denied and the Certification of Representative upheld.

Dated: March 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March 2018, a copy of the foregoing Petitioner's Opposition to the Employer's Request for Review of the Regional Director's Decision was e-filed via the National Labor Relations Board's e-filing platform and one copy served on the following via fax:

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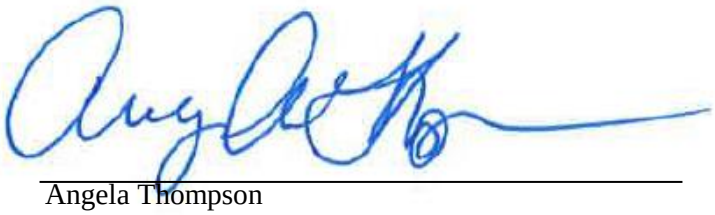

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